12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1909~~ 1913

No. ~~199~~ 13

GEORGE E. TINKER, PLAINTIFF IN ERROR,

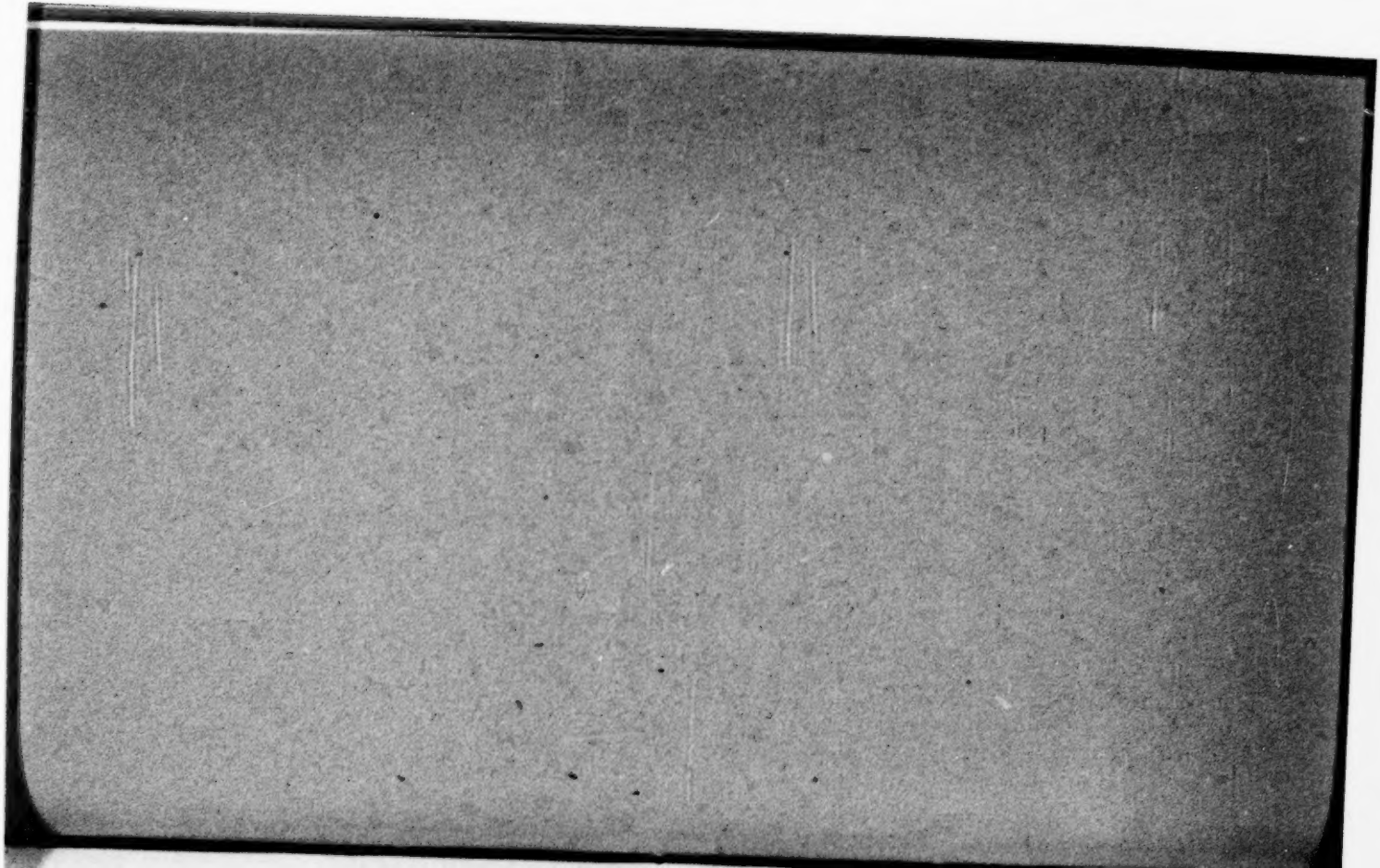
vs.

MIDLAND VALLEY MERCANTILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED JULY 12, 1910.

(22,257)



(22,257)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 102.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

vs.

MIDLAND VALLEY MERCANTILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Guthrie, this June 10, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Dep'y.*

Costs of Suit.

Plaintiff's Costs, $25.00, paid by Geo. E. Tinker.
Defendant's Costs, $1.75, paid by Midland Valley Mercantile Co.
Costs of Transcript, $26.80, paid by Geo. E. Tinker.

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Deputy.*

2

Certificate of Lodgment.

SUPREME COURT,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on June 10, 1910, in the matter of Geo. E. Tinker versus Midland Valley Mercantile Co.,

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Guthrie, Oklahoma, this June 10, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Deputy.*

3 *Citation.*

The President of the United States to the Midland Valley Mercantile Co., Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein Geo. E. Tinker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 18" day of June, 1910.

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

PAWHUSKA, OKLAHOMA, *June* 11, 1910.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

H. C. HARGIS,
Attorney for Midland Valley Mercantile Co.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

4 Supreme Court of Oklahoma.

No. —.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE CO., a Corporation, Defendant in Error.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff in error hereby prays a writ of error from the said decision and judgment to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said George E. Tinker assigns the following errors in the records and proceedings of the said case:

The Supreme Court of the State of Oklahoma erred in holding that the note, the basis of this action, was valid, and in refusing to hold that said note was void, under the provisions of the Act of Congress of March 3, 1901, 31 Stat. L. 1065, 1066, and the amendment thereof by Act of Congress of June 21, 1906, 34 Stat. L. 336.

The said errors are more particularly set forth as follows:

The record shows that plaintiff in error is an Osage Indian, and that defendant in error was a licensed Osage Indian Trader from April 3, 1906, to April 3, 1907, during which time the note in question was executed. That the purpose of the said acts was to liquidate the indebtedness of the Osage Indians, and to thereafter prohibit the Traders from extending credit to any individual Osage in excess of a certain per centum of the next quarterly annuity to which such Indian would be entitled. That defendant in error was prohibited by said act, and the rules and regulations of the Department of the Interior promulgated thereunder, from extending to the plaintiff in error credit in excess of seventy-five per centum of the next quarterly annuity to which he would be entitled.

The record shows that the credit extended to plaintiff in error at the time of the execution of the said note was largely in excess of seventy-five per centum of the next quarterly annuity to which plaintiff in error was entitled, and almost equaled the annuities to which plaintiff in error was entitled during the entire year covered by defendant in error's license as an Indian Trader. That the said note was therefore void, and the Supreme Court of the State of Oklahoma erred in refusing to so hold.

For which errors the plaintiff in error, George E. Tinker, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated November 9, 1909, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

R. B. BOONE,
Attorney for George E. Tinker.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by George E. Tinker, Plaintiff in Error, to the Midland Valley Mercantile Co., Defendant in Error, in the sum of Three Thousand Dollars; such bond when approved to act as a supersedeas.

Dated June 15", 1910.

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By W. M. BONNER, *Deputy.*

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Geo. E. Tinker and Midland Valley Mercantile Co., a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Geo. E. Tinker, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

7 United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk Circuit Court United States, Western District of Oklahoma.

Allowed:

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

8 Copy.

GEO. E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE CO., Defendant in Error.

Bond.

Know all men by these presents, That we, Geo. E. Tinker, as principal, and Charles Martin and John L. Freeman, as sureties, are held and firmly bound unto Midland Valley Mercantile Co. in the sum of Three Thousand Dollars, to be paid to the said Midland Valley Mercantile Co., to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 4th day of June, 1910.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, Therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

GEO. E. TINKER, *Principal.*
CHARLES MARTIN,
JOHN L. FREEMAN,
Sureties.

STATE OF OKLAHOMA,
Osage County, ss:

9 Charles Martin, and John L. Freeman, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Three Thousand Dollars over and above all debts, liabilities and exemptions.

CHARLES MARTIN.
JOHN L. FREEMAN.

Subscribed and sworn to before me this 4th day of June, A. D. 1910.

[SEAL.] GEO. M. TREDWAY,
Notary Public, Osage County, Oklahoma.

My Commission expires 2/8/12.

Bond agreed to be satisfactory:
H. C. HARGIS,
Attorneys for Defendant in Error.

Bond approved, and to operate as a supersedeas.
JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

10 EXHIBIT "A."

STATE OF OKLAHOMA,
Osage County:

In the District Court Held within and for Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Case Made.

Be it remembered, that heretofore, to wit, on the 22nd day of June, A. D. 1907, the plaintiff, the Midland Valley Mercantile Company commenced this action against the defendant, Geo. E. Tinker, by filing in the office of the Clerk of the District Court within and for said State and County its petition which is in the words and figures following, to wit:

Filed the 2 day of May, 1908.

L. M. POE,
Judge of the District Court of said County.
By —— ——, *Clerk.*

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court, By —— ——, Deputy.

11 In the District Court of Pawnee County, Okla. Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALEY MERCANTILE COMPANY, Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Petition.

The plaintiff states, that plaintiff is a corporation organized and existing under and by virtue of the laws of Oklahoma, and has its principal place of business at Pawhuska in said Territory; that defendant is an Osage Indian and resides on the Osage Reservation; that on the 1st day of Sept. 1907, the defendant made, executed, and for a valuable consideration delivered to plaintiff his promissory note of that date whereby and under the terms of which he promised to on Oct. 1st after the date thereof (promised to pay) plaintiff $922.50, together with interest thereon at the rate of 10% per annum therein from date till paid. That a copy of said note is hereto attached and made a part of this petition, and marked "Exhibit A."

That the plaintiff is now the owner and holder of said note, and the same is due and wholly unpaid; that there is a provision in

said note, if suit be instituted we agree that judgment be rendered for 10% of the principal and $10 additional as att'ys fees.

Wherefore, plaintiff prays judgment against the defendant for $996.83, principal and interest and the further sum of $109.68 att'ys fees for this suit and that said judgment bear interest at the rate of 10% per annum and costs of suit.

H. C. HARGIS,
Att'y for Plaintiff.

12 $922.50/100. PAWHUSKA, *Sep. 1st*, 1906.

Oct. 1st, 1906, after date without grace I promise to pay to the Midland Valley Merc. Co. or order Nine Hundred Twenty two & 50/100 Dollars, for value received, negotiable and payable at Pawhuska, Oklahoma, without defalcation or discount, with 10 per cent interest, per annum from date until paid. The interest, if not paid when due to become part of the principal and bear same rate of interest.

The several signers, guarantors or endorsers of this note hereby expressly waive all rights which may inure to them as sureties, guarantors or endorsers by reason of extension of the time of payment to the maker, or delay in the collection, or failure of demand, protest or notice, at maturity of this note by the payee. If suit be instituted we agree that judgment be rendered for ten per cent. of the principal and ten dollars additional as attorneys' fee.

Exhibit "A." GEO. E. TINKER.

Endorsed on back: No. 303. Midland Valley Mercantile Co. v. Geo. E. Tinker. Petition. Filed this 22nd day of June, 1907, Charles L. Watson, clerk of Dist. Court by E. N. Yates, Deputy Clerk. H. C. Hargis, Att'y for pl't'ff.

13 And on the 10th day of September, 1907, the defendant filed a demurrer:

In the District Court of Pawnee, Oklahoma Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Demurrer.

Comes now George E. Tinker, the defendant, and demurs to the complaint, and for cause of demurrer says:

That the complaint does not state facts sufficient to constitute a cause of action.

BOONE, PALMER & MACDONALD,
Attorneys for Defendant.

This demurrer is endorsed on the back as follows, omitting the heading.

No. 303. Demurrer to petition. Filed this 10th day of September, 1907. Chas. L. Watson, Clerk Dist. Court. By E. W. Yates, Deputy Clerk,

14 Demurrer having been overruled in this cause the defendant was allowed time to answer, and within said time defendant answers as follows, to wit:

In the District Court of Pawnee County, Okla. Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Answer.

Comes now the defendant, George E. Tinker, and for answer to the petition herein says:

1. That each and every allegation of each and every paragraph of the petition is untrue and denied except as herein admitted.

2. It is admitted that the defendant is an Osage Indian and resides on the Osage Indian Reservation.

3. It is admitted that the plaintiff is a corporation.

4. It is admitted that defendant executed a note to plaintiff but not as alleged in the petition.

For a further defense the defendant says:

That at the time he executed a note to defendant, it was licensed by the United States Government to trade with the Indians within the Osage Indian Country; that the plaintiff as such licensed trader had from time to time extended credit to defendant as an individual and as head of the family; for goods, wares and merchandise largely in excess of 75% of the next quarterly annuity due after extending such credit to defendant, and said note was given as evidence

15 of such excess indebtedness. That said plaintiff claimed that defendant was indebted to it in the sum sued for over and above 75% of said annuities which had theretofore accrued and which was next thereafter to accrue.

That said note was given for the credit extended over and above the 75% of said annuity, and said note was at the time of its execution over and above 75% of the said annuities accruing next after the extension of said credit.

That the consideration of the said note was illegal and the note is void and defendant pleads such illegality in bar of a recovery.

Wherefore, defendant demands judgment, that said note being given for an illegal consideration is void and no recovery can be had thereon. That plaintiff take nothing by its suit and defendant recover costs of plaintiff. For such other and further relief.

BOONE, PALMER & MACDONALD,
Att'ys for Def't.

On the back of said "Answer", omitting the title to said cause, appears the following endorsements:

No. 303. Answer. Filed this 1st day of October, 1907. Chas. L. Watson, Clerk Dist. Court, by E. N. Yates, Deputy Clerk.

16 Thereafter, to wit, on the 15th day of February, 1908, the plaintiff replied as follows:

In the District Court of Pawnee County, Sitting at Pawhuska, in the Osage Indian Reservation, Oklahoma Territory.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Reply.

Comes now the plaintiff herein and for its reply to the answer of the defendant says it denies each and every allegation the said answer contained.

H. C. HARGIS,
Attorneys for Plaintiff.

On the back of said "Reply", omitting the title, to said cause, appears the following endorsements:

Plaintiff's reply to defendant's answer. Filed in the District Court Feb. 15th, 1908. Thos. Leahy, Jr. Clerk.

17 That on the 28th day of February, 1908, this cause came on for hearing, the same being one of the regular judicial day of the February, A. D. 1908 term of the District Court of Osage County, Oklahoma, and was tried upon its merits, the plaintiff appearing in person and by his attorney, H. C. Hargis, and the defendant appearing by his attorneys, Boone, Palmer & Macdonald, and thereupon twelve good and lawful men from the body of the said County of Osage and State of Oklahoma were called, qualified and sworn to well and duly try the said cause: That thereupon, after the reading of the pleadings, his Honor L. M. Poe, Judge of the said Court, held and ruled and so ordered that the burden of proof was upon the defendant, to which ruling and order the defendant in apt time excepted and assigned the same as error; that thereafter the defendant introduced the following witnesses, to wit:

1st. George E. Tinker, the defendant, called in his own behalf as a witness, having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit as set out in the evidence as certified to by the official stenographer, and by his Honor, L. M. Poe, which evidence is hereby referred to and made a part of this case made.

2nd. Thereafter H. C. Ripley having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, to wit: as set out in the evidence as cer-

tified to by the official court stenographer, and by his Honor L. M. Poe, which evidence is hereby referred to and made a part of the case made: The evidence of each of said witnesses being as follows:

18 Osage District Court.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Bill of Evidence and Exceptions.

Hon. L. M. Poe, Presiding.

Appearances:

Mr. H. C. Hargis, for plaintiff.
Boone, Palmer & MacDonald, for defendant.
Jesse J. Worten, official stenographer.

Be it remembered, that, heretofore, to wit: the 28th day of February, A. D. 1908, the following evidence was heard at the above styled action.

Mr. GEO. E. TINKER, the defendant, is first called and being duly sworn, testifies as follows:

Q. You may state your name?
A. Geo. E. Tinker.
Q. Are you the defendant in this case?

By Mr. HARGIS: Plaintiff at this time desires to object to any evidence being introduced in this case.
By the COURT: Objection is overruled.
Mr. HARGIS: Exception.

A. Yes, sir.
Q. Mr. Tinker you are an Osage Indian?
A. I am.
19 Q. In September, 1906, were you a member of the Tribe of Osage Indians?
A. I was.
Q. Were you a married man at that time?
A. Yes sir.
Q. And had a family?
A. Yes sir.
Q. How many had you in your family at that time?
A. Seven in all.
Q. You had that many on September 1st, 1906?
A. Yes sir.
Q. Mr. Tinker when was the payment had, the quarterly payment to Osage Indians in 1906?
A. My recollection is it was along about the 4th.

Q. The 4th of what month?
A. September.
Q. When was the last payment made before that time to the Osage Tribe of Indians?
A. Some time about three months before that time.
Q. Can you state how much you drew or were entitled to draw from the Government by virtue of annuities, both as the head of a family and individually, on September 1st, 1906?

Mr. HARGIS: We object for the reason that it is irrelevant, incompetent and immaterial.
By the COURT: Objection is overruled.
Mr. HARGIS: Exception.

A. $46.00 per head and there were seven members of the family.
Q. As a member of the Osage Tribe, and as individually, and as the head of a family, how much was your quarterly payment next after September, 1st, 1906.

Mr. HARGIS: Now we object to that question.
20 By the COURT: Overruled.
Mr. HARGIS: Exception.

A. I think about $280.00 as the head of a family, it was about that.
Q. Was it as much as $922.00?
A. No, sir.

Stand aside.

Mr. H. C. RIPLEY is called by defendant and being duly sworn, testifies as follows:

Mr. BOONE questions witness:

Q. You may state your name?
A. H. C. Ripley.
Q. I believe you are the Trade Supervisor for the Osage Tribe of Indians?
A. I am.
Q. On September 1st, 1906, can you state whether or not the Midland Valley Mercantile Company was a licensed trader in the Osage Indian Reservation?

Mr. HARGIS: We object unless it is first shown that he has the records in his possession, and if so let him produce them.
By the COURT: Objection will be sustained.
Mr. BOONE: Exception.

Q. Have you with you any of the records showing the traders at that time?
A. No.
Q. Can you get them Mr. Ripley?
A. Yes, sir.

(Witness is given ten minutes to procure the records.)

21 Q. Have you in your possession the records showing traders with the Osage Indians upon this Reservation in 1906?

A. I have my list of the traders.

Q. Will you turn to it please and state what the records show as to the Midland Valley Mercantile Company on September 1st, 1906?

Mr. HARGIS: We object for the reason that it is not competent evidence.

By the COURT: Objection is overruled.

Mr. HARGIS: Exception.

A. Their license was granted on the 3rd day of April, 1906, and expired on the 3rd day of April, 1907.

Mr. HARGIS: Now we move to withdraw the above answer from the consideration of the jury.

By the COURT: Your motion is overruled.

Mr. HARGIS: Exception.

Q. As Trade Supervisor is it a part of your duty, your official duty, to keep a record in your office of the traders with the Indians. Licensed traders of course?

Mr. HARGIS: We object for the reason that this is incompetent, and not the best evidence.

By the COURT: Objection is overruled.

Mr. HARGIS: Exception.

A. I have to keep a record of all licensed traders.

By the COURT:

Q. He asked you if it was your duty?

A. Yes, sir.

Q. You kept this record correctly?

A. Yes, sir.

22 Cross-examination by Mr. HARGIS:

Q. Mr. Ripley where are the applications filed, and with what office, for a trader's license?

A. They are filed with Secretary of Indian Affairs at Washington.

Q. Do you know whether that office issues a paper or certificate or not?

A. They do.

Q. You are not the custodian of that certificate?

A. No, sir.

Q. From what office did you obtain the list that you had, that you testified to in this case?

A. When the Agent receives a license he gives it to me and it is placed in the files.

Q. And you have that record that you had recorded?

A. Yes, sir.

Q. You may refer to your record and tell the jury what that contains?

A. It contains the name of the firm and the date of the license.
Q. I wish you would kindly refer to it and read what it says?
A. Midland Valley Mercantile Company, Agent's license, 4/2/06 to 4/2/07.
Q. You understand that the Midland Valley Mercantile Company was a corporation?
A. No I don't know.
Q. Did the department license corporations to trade with Indians?
A. They were there.

Stand aside.

23 Now comes plaintiff and interposes a demurrer to the evidence in this case.

By the COURT: The demurrer to the evidence will be sustained. To which defendant is given his exceptions.

STATE OF OKLAHOMA,
County of Osage, set:

I, Jesse J. Worten, Official Court Reporter in and for the State and County aforesaid, certify that the foregoing bill of evidence and exceptions, contains all the evidence that was submitted to the court and jury, both oral and written, at the trial of the action wherein the Midland Valley Mercantile Co., is plaintiff, and Geo. E. Tinker is defendant.

I further certify that this is a full, complete and accurate transcript of said evidence.

In witness whereof I have hereunto set my hand, this the 4th day of March, 1908.

JESSE J. WORTEN,
Official Court Reporter.

24 I, L. M. Poe, Judge of the Osage District Court, certify that I have examined the foregoing bill of evidence and exceptions mentioned in the above certificate of the official court reporter, and find that it is a full, complete and accurate transcript of all the evidence submitted at the trial of the aforesaid action, containing all the rulings of the court with the objections and exceptions. I further certify that I approve said Bill of Evidence and Exceptions and order that same be filed and made a part of the record in this case.

Witness my hand, this the 4th day of March, 1908.

L. M. POE, *Judge.*

George E. Tinker and H. C. Ripley were the only witnesses who testified in said cause, and the evidence as hereinbefore set out and certified by the official court stenographer and the Judge of the said Court, contains all the evidence offered by either side in the trial of said cause.

25 And after said testimony of said Ripley the defendant rests his case, that thereupon the plaintiff filed in said Court

in said cause its demurrer to the said evidence of the plaintiff, which said demurrer is in the words and figures following, to wit:

In the District Court of Osage County, Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Demurrer.

Comes now the plaintiff herein and demurs to the evidence offered by the defendant in this action, for the reasons and upon the ground that admitting the evidence to be true for the purposes of the demur- the same states no defense to plaintiff's cause of action.

H. C. HARGIS,
Attorney for Plaintiff.

On the back of said demurrer appears the following endorsements (Omitting title):

Filed this 27th day of Feb. 1908. Thos. Leahy, Jr. Clerk Dist. Court. By Geo. L. Boone, Deputy Clerk. Demurrer to Evidence. Filed this 27th day of Feb'y 1908. Thos. Leahy, Jr. Clerk Dist. Court. H. C. Hargis.

26 That thereupon said demurrer came on for hearing, and after the argument of the counsel thereon, the Court, being fully advised in the premises sustained said demurrer: to the ruling of said Court, the defendant then and there in apt time duly excepted to the said ruling.

Then came the plaintiff and moved the court for judgment in its favor and against the defendant according to the prayer of the petition, and the defendant moved the Court to direct the verdict in his favor unless the plaintiff introduced evidence to contradict the evidence offered by the defendant.

This motion of the defendant was overruled and the defendant excepted in apt time.

Court then sustained the motion of the plaintiff, to which ruling defendant in apt time excepts.

27 That at the proper time, and on the 28th day of February, 1908, and within three days after the sustaining of the plaintiff's motion as here-before set out, and during the said term of said District Court defendant filed in said court in said cause its motion for a new trial, which said motion is as follows, to wit:

28 In the District Court of Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court to grant a new trial in this cause for the reason that the Court erred in sustaining the demurrer to evidence, and for the further reason that the Court erred in not granting the defendant's motion directing the jury to return a verdict in favor of the defendant.

That thereafter, to wit, on the 28 day of February, 1908, and during said term of said Court said motion of said defendant for a new trial came on for hearing, and after the argument of the counsel thereon, and on the said day, the Court being fully advised in the premises, overruled said motion for a new trial, and refused to grant said defendant a new trial, to which action of the Court in overruling said motion for a new trial, and in refusing to grant the defendant a new trial, said defendant then and there duly excepted in apt time; that thereafter, to wit, on the 28 day of Febr'y 1908, and during said term of said Court, the court proceeded to, and did make and render judgment against said defendant, and in favor of the plaintiff, for the sum of $—, principal and interest, and the further sum of $— attorney's fees, and the further sum of $— as costs of this action; to which action of the court, in making and rendering said judgment, and each and every part thereof, said defendant then and there duly excepted at the time; that the
29 court, on the day last aforesaid, immediately after the overruling of the motion for a new trial, and during said term of said Court, and for good cause shown, granted said defendant 50 days from said 28 day of Feb'y 1908, in which to prepare, and serve upon the plaintiff a record and case made for the Supreme Court, the plaintiff to have 10 days thereafter in which to serve and suggest amendments thereto, and the same to be settled on 10 days' notice by these parties; supersedeas bond fixed at $1000.00 to be approved by the Clerk of this court.

Which said judgment so rendered as hereinbefore stated, is in the words and figures following, to wit:

30 In the District Court of Osage County, Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Journal Entry.

On this 27th day of February, 1908, the same being one of the regular judicial days of the February term of the Court, this cause comes on for hearing on the regular call of the docket.

The plaintiff appeared by Hargis & Hill, its attorneys, and the Defendant appeared in person and by Boone, Palmer & MacDonald, his attorneys, and the Court finds that this is an action brought upon a promissory note, and that the execution thereof is not denied, and that the burden is upon the defendant in this action.

A jury of twelve good and lawful men are duly impaneled by the Court and found qualified in all respects, and both plaintiff and defendant accepts the jury.

Thereupon the defendant offers his evidence and rests, and the plaintiff offers hes demur- to the evidence of the defendant for the reason that if the said evidence be true the same proves no defense to the plaintiff's cause of action, and the same is argued by the counsel for the plaintiff and the defendant, and the court being fully advised in the premises sustains said demur- to the sustaining of which demur- the defendant excepts.

Thereupon the court orders that the jury in this case be, and the same is hereby discharged.

31 Wherefore, it is ordered, decreed and adjudged by the court that the plaintiff, the Midland Valley Mercantile Company, a corporation, have and recover of and from the defendant, George E. Tinker, the sum of One Thousand and Sixty Dollars and eighty-five cents, ($1065.85) principal and interest on the said note to this date, and the further sum of one hundred and two dollars and Twenty-five cents ($102.25) attorney's fees as provided for in the note sued upon in this action, and the costs of the action taxed at $11.09, and that this judgment bear interest at the rate of 10% per annum from this date, and hereof let execution issue.

And thereafter to wit on the — day of — 1908, and within three days from the rendition of this judgment the defendant advances his motion for a new trial, and said motion is considered by the court, and the arguments for counsel for plaintiff and defendant heard, and the Court overrules said motion to the overruling of which the defendant then and there excepts.

L. M. POE, *Judge.*

O. K.
H. C. HARGIS,
Attorney for Plaintiff.

—— ——,
Attorney for Defendant.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

32 STATE OF OKLAHOMA,
Osage County, ss:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

To the above named defendant in error and his attorney of record, H. C. Hargis:

The above and foregoing case made is hereby tendered to and served upon you, and each of you, as a true and correct case made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, findings, evidences, judgments and proceedings in the above entitled cause.

BOONE, PALMER & MACDONALD,
Attorneys for Plaintiff in Error.

I hereby accept and acknowledge due, legal and timely service of the above and foregoing case made on me this 1 day of Apr. 1908.

H. C. HARGIS,
Attorney for Plaintiff, Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

The foregoing case is correct.

H. C. HARGIS,
Attorney for Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

33 The foregoing sets out fully and correctly all of the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders were in apt time and allowed, and the same is a true and correct statement, and complete transcript of all the pleadings, motions, findings, evidence, orders, rulings and judgments and other proceedings in said cause.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

34 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

We, the undersigned, attorneys of record for the above named defendant in error, do hereby waive notice to us of the time and place of presentation of the above and foregoing case made to the Judge of the said District Court before whom said case was tried for settlement and signing, and hereby agree that said case made may be presented to said Judge for settlement and signing, and be settled and signed and allowed by said Judge at such time as it may suit his convenience to do so.

H. C. HARGIS,
Attorneys for Defendant in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

35 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Be it remembered, that on the 2 day of May, 1908, the same being the time appointed and agreed upon by counsel for signing and settling of the case on appeal at the court house in the City of Pawhuska, in the County of Pawhuska, in the State of Oklahoma, the above and foregoing case made was presented to me, L. M. Poe, Judge of the District Court of said Osage County, before whom said cause was heard, to be settled and signed as the original case made herein as required by law, by the parties of said cause: and it appearing to me that said case made has been duly made and served upon the defendant within the time fixed by the order of this Court, and in the time and in the manner provided by law; that said plaintiff was present by his attorney, H. C. Hargis, and the defendant by his attorneys, Boone, Palmer & MacDonald, and said case made, having been examined by me is true and correct, and contain a true and correct statement and complete transcript of all the pleadings, motions, orders, findings, evidence and rulings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as a true and correct case made in said cause, and hereby order

that the Clerk of said Court attest the same with his name and the seal of the said Court and file the same of record as provided by law.

Witness my hand this the 2d day of May, 1908.

L. M. POE,
Judge of the 21st Judicial District of Oklahoma.

36 Attest:

[SEAL.] THOS. LEAHY, JR.,
Clerk of the District Court of Osage County, Oklahoma.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

37 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

I, H. C. Hargis, the undersigned attorney for the defendant in error hereby waive the issuing and service of summons in error in the above entitled cause.

H. C. HARGIS,
Attorney for Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

38 In the Supreme Court of the State of Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error,
vs.
GEORGE E. TINKER, Plaintiff in Error.

Petition in Error.

Comes now the plaintiff in error, Geo. E. Tinker, and for his cause of action in error alleges and avers:

That on the 28th day of February, 1908, in a cause pending in the District Court of the County of Osage and Territory of Oklahoma, where the defendant in error, the Midland Valley Mercantile Company was plaintiff, and this plaintiff in error, George E. Tinker, was defendant, the plaintiff in said court below, by the consideration of said court recovered judgment against the defendant of the court below this plaintiff in error for the sum of $1060 85 principal and interest, together with the costs of action in that behalf expended, and the said judgment, together with all pleadings, process,

procedure, evidence, rulings and proceedings of every kind and character taken and had by the Court in said cause wherein the judgment was rendered, are all preserved in a case duly made, served, signed and settled, which said case made is hereto attached, marked "Exhibit A" and hereby made a part of this petition in error.

The plaintiff in error alleges that in the proceedings resulting in said judgment there is manifest error to the substantial prejudice of the rights of this plaintiff in error in the following, to wit:

39 1st. The court erred in sustaining the demurrer to the evidence interposed by the plaintiff in error, which was duly excepted to as required by law.

2nd. For a further reason, that the Court erred in not granting the plaintiff's in error motion directing the jury to return a verdict in favor of the plaintiff in error, to the rulings of the said court in refusing to so direct the plaintiff in error duly excepted and assign the same as error.

3rd. That the court erred in overruling the motion made by the defendant in the court below for a new trial.

4th. The court erred in rendering judgment as set out in said cause, to each of which rulings and orders complained of the defendant duly excepted as shown by the case made.

Wherefore, the plaintiff in error prays that this court will examine the alleged errors, reversing said cause and remanding the same for a new trial, and for such other and further relief as to the court may seem just and right.

BOONE, PALMER & MACDONALD,
Att'ys for Plaintiff in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

40 STATE OF OKLAHOMA,
Osage County:

In the District Court Held Within and for Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

I, Thos. Leahy, Jr. Clerk of the District Court for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof I have hereto set my hand and the seal of the court this the 2nd day of May, 1908.

[SEAL.] THOS. LEAHY, JR., *Clerk.*

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

41 Endorsed on the back as follows, to wit:
No. 190. Midland Valley Mercantile Co. v. G. E. Tinker. Case made.
Service of this case made on appeal is hereby fully accepted as if same had been served by the Sheriff or other proper person.

H. C. HARGIS,
Att'y for Defendant in Error.

#190.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

42 And afterwards, at the May, 1909, Term of said Supreme Court, on the 12th day of May, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

And now this cause is submitted on the record and briefs filed herein.

43 And afterwards, at the May, 1909, Term of said Supreme Court, on the 6th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that plaintiff in error in the above cause be allowed to number pages of case made.

44 And afterward, at the July, 1909, Term of said Court, on the 13th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the motion to dismiss in the above cause be, and the same is hereby overruled.

45 And thereafter, at the July, 1909, Term of said Supreme Court, on the 13th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that defendant in error in the above cause be allowed 10 days to file briefs.

46 And afterwards, at the September, 1909, Term of said court, on the second day of November, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the motion to advance the above cause, be, and the same is hereby overruled.

47 And afterward, at the November, 1909 Term of said Supreme Court, on the 9th day of November, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the Court having duly considered the same, and being fully advised in the premises, finds, that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause, be, and the same is hereby affirmed.

Opinion by Hayes, J. All the Justices concur.

48 In the Supreme Court of the State of Oklahoma.

No. 190.

GEORGE E. TINKER, Plaintiff in Error,
v.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

(*Syllabus by the Court.*)

Where the maker of a promissory note seeks to avoid the same upon the ground that it was executed without consideration, or for a consideration that was void under a statute, the burden of proof is upon him to show that the note was without consideration or that it was given for a consideration prohibited by the statute.

Error from District Court of Pawnee County, Territory of Oklahoma.

L. M. Poe, Trial Judge.

Boone, Palmer & McDonald, Attorneys for Plaintiff in Error.
C. R. Buckner, Attorney for Defendant in Error.

Affirmed.

Opinion of the court by HAYES, *J.*:

This is an action on a promissory — for the sum of $922.50 executed by plaintiff in error, defendant below, to defendant in error, plaintiff below, on September 1st, 1906. Plaintiff's petition contains the averments necessary to state a cause of action on a promissory note. Defendant by his answer admits the execution and
49 delivery of the note, but for his defense to the action, he alleges that at the time he executed the note, plaintiff was licensed by the United States Government to trade with the Indians within the Osage Indian Reservation; that defendant is an Osage Indian, and that plaintiff, as such licensed trader, had, from time to time, extended credit to him as an individual and as head of a family, for goods, wares and merchandise largely in excess of seventy-five per cent of the next quarterly annuity due after extending such credit to defendant; that said note was given as evidence of such excess indebtedness, and therefore the consideration of the note was illegal and the note void. After defendant, who assumed the burden of proof, had introduced his evidence, the court sustained a demurrer thereto and rendered judgment in favor of the plaintiff for the amount of the note, including interest and attorney's fees. This action of the court is the only error urged for reversal of the case.

We have carefully examined the evidence and think the court committed no error. By the Indian Appropriation Act of March 3d, 1901, it was provided:

"That it shall be unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian or head of a family to an amount greater than sixty per centum of the next quarterly annuity to which such individual Indian or head of a family will be entitled; and if such trader shall give credit to any individual Indian or head of a family upon such reservation in excess of the amount herein allowed, no portion of the indebtedness thus created shall be collectible, and the same shall be void and the license of such trader shall be revoked".

(31 Stat. L. 1065).

Defendant attempts to charge in his answer that plaintiff, from time to time, in violation of the above statute, extended credit to defendant in excess of the amount permitted by the statute, and that the note in controversy was given in settlement of such indebtedness. He does not charge that the indebtedness was made or contracted at the time the note was given. Defendant testified that the amount he received for himself and family on September 4th, 1906, which was the first annuity after the execution of the
50 note, was $280.00, but there is no evidence whatever tending to prove the essential allegations of the answer, except that plaintiff was a licensed Indian Trader upon the Osage Indian Reservation. There is no evidence whatever that the note was given in payment of excess credits granted by plaintiff from time to time. It is not charged that the note was given in payment for goods purchased since the last quarterly annuity before the execution of the note or in settlement of credits extended during that time and there is no evidence to that effect. It is true that the amount of the note is greater than the annuity received by defendant on September 4th, 1906, just after the execution of the note, but there is nothing in the evidence to show that the debt which the note represented was created at that time and the allegations of the answer are that it was not; nor was there anything in the evidence to show that the debt or any part thereof which the note represented, when created, was in excess of the amount of the following annuity which the maker of the note received.

In an action brought by the payee upon a promissory note where the defendant admits the execution and delivery of the note, in order to defeat it, the burden of proof is upon him to establish that the note was without consideration or that its consideration was illegal. Pixley v. Boynton, 79 Ill. 351; Stanton v. Strong, 94 Ill. App. 486; Sollenberg v. Stephens, 46 Kan. 386; Cundiff v. Campbell, 40 Tex. 142.

The judgment of the trial court is affirmed.

Kane, C. J. Williams, Dunn, Turner, JJ. concur.

51 In the Supreme Court of the State of Oklahoma.

No. 190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Application for Re-hearing.

Comes now the plaintiff in error, and makes application to the court to grant him a re-hearing in the above entitled cause, for the reason that the court in determining said cause has overlooked questions of fact presented by the evidence in said cause, which are decisive of this controversy. The evidence discloses on page 16 of the record that the defendant in error was licensed as a trader with the Osage Indians upon the Osage Indian Reservation during the year 1906, and that their license extended from April 3, 1906, to April 3, 1907.

The evidence further discloses on pages 14 and 15 that the plaintiff in error, who is a member of the Osage Tribe of Indians, was entitled to a quarterly annuity at the rate of $46.00 per head, and that there were seven (7) members of the family, which would make not to exceed Three Hundred Twenty-two ($322.00) Dollars per quarter, which the plaintiff in error was entitled to, or Six Hundred Forty-four ($644.00) Dollars, for the two quarters prior to September, 1906, and the note sued upon shows an extension of credit to this particular member of the Osage Indian Tribe, in the sum of Nine Hundred Twenty-two ($922.00) Dollars, which is conclusive in itself that the defendant in error, a licensed Indian Trader extended credit during the two quarters which it was entitled to trade with the Indians, not only an amount greater than sixty per cent. of the next quarterly annuity, but for an amount greater than the entire annuity for two quarters, and we respectfully
52 submit that the court overlooked this phase of the proposition in rendering its opinion, which brings this cause squarely within the provision of the Indian Appropriation Act of March 3, 1901, referred to in the opinion filed in this cause.

BOONE, LEAHY & McDONALD,
Attorneys for Plaintiff in Error.

Filed Nov. 23, 1909. W. H. L. Campbell, Clerk.

53 And thereafter, at the November, 1909, Term of said Supreme Court, on the 30th day of November, 1909 the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the petition for rehearing in the above cause be, and the same is hereby denied.

54 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, both inclusive, are a full, true and complete transcript of the record and all proceedings in the cause of George E. Tinker, Plaintiff in error, vs. Midland Valley Mercantile Company, Defendant in error, No. 190, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at Guthrie, Oklahoma, this 21st day of June, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

Endorsed on cover: File No. 22,257. Oklahoma Supreme Court. Term No. 102. George E. Tinker, plaintiff in error, vs. Midland Valley Mercantile Company. Filed July 12th, 1910. File No. 22,257.

/3

Supreme Court U. S.
FILED
OCT 31 1913
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 13.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

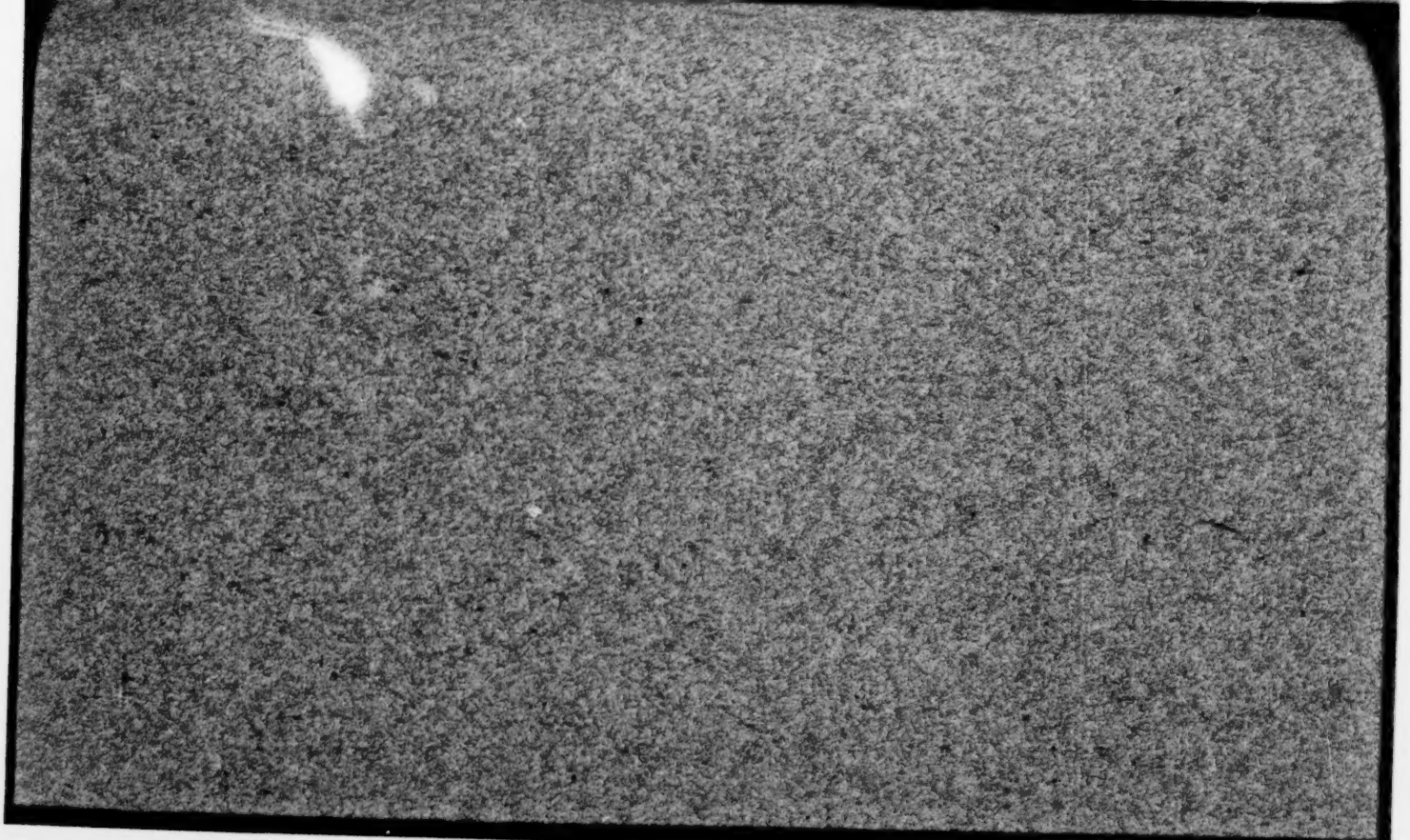
VS.

MIDLAND VALLEY MERCANTILE COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. H. MERILLAT,
Attorney for Plaintiff in Error.

J. B. MILAM & SONS, LAW PRINTERS, 607 8TH ST. N. W., WASH. D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 13.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

VS.

MIDLAND VALLEY MERCANTILE COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes before the court on writ of error from the Supreme Court of the State of Oklahoma which affirmed (Trans. Rec., 23) a judgment rendered February 27, 1908, by the District Court of Osage County of the State of Oklahoma (Rec., 16) against Tinker, the plaintiff in error, in the sum of $1,065.85 upon a promissory note made by Tinker (Rec., 7) payable to the defendant in error in the sum of $922.50, the note bearing date Pawhuska, September 1, 1906, and being payable October 1, 1906. The judgment also bore (Rec., 16) the further sum of $102.25 as attorney's fees upon the note for non-payment thereof.

Statement of the Case.

The record in the case shows that George E. Tinker, the plaintiff in error at the time of the trial, and in September, 1906, was a member of the Osage tribe of Indians and had a family consisting in all, including himself, of seven persons. He admitted by his pleading to the suit filed against him upon the promissory note that he had executed the note, but pleaded (Rec., 8) that the note and the consideration thereof was illegal in that the payee of the note and the plaintiff in the action against him was a licensed trader with the Indians in the Osage Indian country, that he, Tinker, was an Osage Indian and that "the plaintiff as such licensed trader had from time to time extended credit to defendant as an individual and as head of the family for goods, wares and merchandise largely in excess of seventy-five per cent of the next quarterly annuity due after extending such credit to defendant, and said note was given as evidence of such excess indebtedness." It averred that plaintiff claimed that defendant was indebted to it in the sum sued for over and above seventy-five per cent of said annuities which had theretofore accrued and which was next thereafter to accrue.

Tinker as witness, testified that the next quarterly payment made after September 1, 1906, the date of the note, was a payment of $46.00 per head made September 4, 1906, the total payment to him as head of the family being about $280.00.

H. C. Ripley, the trade supervisor for the Osage tribe of Indians, testified (Rec., 11) that the Midland Valley Mercantile Company had a license to deal with the Osage Indians granted April 3, 1906, which expired April 3, 1907.

Upon the foregoing record the trial court gave judgment against Tinker and upon that judgment, on a case made, being affirmed by the Supreme Court of Oklahoma a writ of error was sued out (Rec., 3) to this court.

The ground of the writ of error is that the note was void under statutes of the United States relating to the Osage tribe of Indians and that there was drawn in question (Rec., 4) "the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity" and that "the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission."

Assignment of Errors.

1. That the court below and the trial court on the whole record erred in not giving judgment in favor of the plaintiff in error (defendant below).

2. That the court below erred in affirming the judgment of the trial court in entering judgment in favor of the defendant in error (plaintiff below).

3. That the court erred in not holding that the note sued upon was void under the statutes of the United States in such cases made and provided and not collectible under such statutes.

4. That the court erred in holding that there was not a presumption on the whole record that the note sued upon was given in payment of an indebtedness accruing during the quarter preceding the quarterly payment of September 4, 1906.

5. That the court erred in holding that the burden of proof was upon the plaintiff in error (defendant below)

to prove, notwithstanding the note largely exceeded the September 4, 1906, annuity payment, that it represented excess and illegal credits granted by the defendant in error to the plaintiff in error and in not holding that the burden of proof was upon the defendant in error (plaintiff below) to show that the note represented lawful credits upon it being shown the note had been executed Sept. 1, 1906.

Argument.

By the Constitution of the United States plenary power over commerce with the Indians in the several states is vested in the United States. By the Enabling Act admitting Oklahoma to Statehood it was expressly provided that the authority of the United States over the Indians within the borders of the State should continue unimpaired, notwithstanding the grant of statehood.

By the provisions of the Revised Statutes of the United States no person can treat with an Indian without first obtaining a trader's license. At the time the note was given the Osage Reservation was still unallotted and the Osage Indians held their land in common and they lived upon a typical Indian Reservation, allotment in severalty not yet having been effected.

The applicable provisions of the Revised Statutes of the United States are as follows:

Sec. 2129. No person shall be permitted to trade with any of the Indians in the Indian country without a license therefor from a Superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river.

Sec. 2131. The superintendent of the district shall have power to revoke and cancel any license to trade within the Indian country whenever the person has, in his opinion, transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or whenever in his opinion, it is improper to permit such person to remain in the Indian country. No trade with the tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. The persons granting or revoking such licenses shall forthwith report the same to the Commissioner of Indian Affairs, for his approval or disapproval.

Sec. 2133. Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

With respect to trading on the Osage Indian Reservation there was special congressional legislation resulting from the many difficulties that had been occasioned with Indian traders by reason of the comparative wealth of the Osage Indians, and dealings with the Indians were under the supervision of an official of the Indian service known as the Trade Supervisor, Mr. H. C. Ripley. (Rec., 11.)

By the act making appropriation for the Indian service approved March 3, 1901 (31 Stats., 1058-65) Congress provided for an examination and adjustment of outstanding accounts between the Indian traders and the

Osage Indians which had long been in dispute, and then, as to future accounts, enacted:

"And provided further, that it shall be unlawful hereafter for the traders upon the Osage Indian reservation to give credit to any individual Indian or head of a family to an amount greater than sixty per centum of the next quarterly annuity to which such individual Indian or head of a family will be entitled; if such traders shall give credit to any individual Indian or head of a family upon such reservation in excess of the amount herein allowed no portion of the indebtedness thus created shall be collectible, and the same shall be void and the licenses of such traders shall be revoked."

This act was amended by the Indian Appropriation Act, approved June 1, 1906 (34 Stats., 325-366), to read as follows: "That it shall be unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian, head of a family, to an amount greater than seventy-five per centum of the next quarterly annuity to which such Indian will be entitled."

That it was competent for Congress to pass the foregoing legislation is not longer open to question. In Roff vs. Burney, 168 U. S., 218-22, it was held, citing a number of prior opinions:

> "The Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States."
>
> See also Lone Wolf vs. Hitchcock, 187 U. S., 553.

Congress, in the exercise of its power and duty to protect this dependent people from their own improvidence, imposed limitations upon their capacity to contract, and upon those contracting with them, specifically prohibited the Indian traders who were in the Osage reservation and dealing with the Osage Indians by its license and had, save for that license, no trading rights whatsoever, from "giving credit" to an Osage Indian in excess of seventy-five per cent of the forthcoming quarterly payment to the Indian and in express terms declared void and non-collectible any "indebtedness" created in violation of the act. The note sued on was given just prior to a payment and is several times in excess in amount of that payment.

The legislation in question has its counterpart in statutes, common in many States, for the protection of married women by declaring void their contracts as accommodation makers, endorsers or guarantors. Such statutes it has been repeatedly held, should be liberally construed and enforced in accordance with the spirit of protection and the public policy underlying them.

Waters vs. Pearson, 39 App. D. C., 10.

With reference to Indians the rule of this court is that the principle of enlarged construction shall be applied to Indians and statutes construed and enforced so as to afford them the protection due a dependent people.

Choate vs. Trapp, 224 U. S., 665-75.
United States vs. Winans, 198 U. S., 371.

When therefore it appeared that the maker was an Osage Indian, that the payee was a licensed Osage Indian trader, that the note sued on was given Sept. 1, 1906, and largely exceeded in amount the next quarterly annuity due and paid Sept. 4, 1906, to the Indian, it is respect-

fully submitted that the invalidity of the note was made at once to appear and that judgment should have been given in favor of plaintiff in error and the underlying policy of Congress enforced. The trader had merely a qualified right of dealing with the Indians and the borders of proof was upon him to bring himself and his note sued upon within his qualified right. When it appeared that the note was given or alleged to be given to a trader and exceeded the prima facie contractual or trading rights of the parties thereto, it was incumbent upon the mercantile company if it would still contend the note was valid to show the facts which would establish such validity. In the instant case the proof showed the trader's license had begun only April 3, 1906, and if it would contend that it had extended credits from time to time to plaintiff in error and that since its license rights began, there had been an annuity payment of which the credits shown by the note sued on did not exceed 75 per cent of such payment it was incumbent upon the defendant in error to show that fact.

It is submitted that the case is controlled by the principle laid down in United States vs. Denver & R. G. R. R. Co., 191 U. S., 85; United States vs. Cook, 19 Wall., 591, and Northern Pacific R. Co. vs. Lewis, 162 U. S., 366, in all of which cases the controversy turned on the question upon whom rested the burden of proof where there was only a qualified, limited or special right of contract or dealing with government or Indian lands, and in all of which it was held that upon it being shown the property was of the character upon which there were conditions, limitations or restrictions, the burden of proof was upon the party claiming the right to prove such right by facts adduced in evidence.

In United States vs. Cook, *supra*, timber had been severed from Indian lands and sold, the law prohibiting this except where the cutting would better adapt the land to occupation. The court said:

> "The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land."

The case is not one as erroneously held below such as where a note given for a gambling debt or other illegal consideration, but one where the evidence showed the party to be under a legal disability to contract; wherefor it is submitted the burden of proof was upon the payee to show by evidence, facts and circumstances that removed the maker and his note from this legal disability, and that would bring the note in question within some exception to what upon the face of the transaction made out a prima facie case of non-liability The knowledge of when, in what amounts and for what credits has been given and goods sold to plaintiff in error or members of his family was peculiarly within the knowledge and open to proof of the mercantile company and if, when want of capacity to give a note of the size in question was made to appear, it was claimed there was in fact capacity to be given the credits evidenced by the note, the burden was on defendant in error to show it.

The Oklahoma Supreme Court, it is submitted, erred in holding the case governed by the rule of law where the defense is that the note was founded upon an illegal

consideration, in which cases the authorities are that the burden of proving the consideration was illegal, rests on the party making such defense. The defense instead being want of capacity to make the note, and the note being shown to be made by an Indian and to exceed his next quarterly annuity, the case was analogous to one where the defendant not being a banking corporation the acceptance of a bill was not within the apparent authority with which the agent was invested, in which case it is for the payee to prove that the acceptance was authorized by the charter, by laws or resolutions of the corporation.

Mather vs. Union L. & T. Co., 7 N. Y. Supp., 213.

Olcott vs. Tioga R. Co., 27 N. Y., 546.

This court has jurisdiction because in the courts below the federal statutes and the federal exemption were specifically pleaded, and the question arising under them distinctly and directly brought forward. Evidence was permitted to be and was given competent to raise the right under the federal statute, and the fact that the decision of the state courts was adverse to the plaintiff in error on the effect of the evidence does not prevent the rights of the plaintiff in error under the applicable statutes and the evidence adduced being fully considered in this court on the merits.

Dower vs. Richards, 151 U. S., 658.
Mackay vs. Dillon, 4 How., 421.

Respectfully Submitted,

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